

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U
338-E) For Authority to, Among Other Things, Increase Its
Authorized Revenues For Electric Service in 2006, And to
Reflect That Increase in Rates.

Application 04-12-014
(Filed December 21, 2004)

Investigation on the Commission's Own Motion into the
Rates, Operations, Practices, Service and Facilities of
Southern California Edison Company.

Investigation 05-05-024
(Filed May 26, 2005)

**MOTION FOR A "JUST TRANSITION" IN RESPONSE
TO CLOSURE OF THE MOHAVE GENERATING STATION**

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The Just Transition Coalition (Coalition)¹ respectfully submits its Motion for a "Just Transition" in response to Southern California Edison's (SCE's) decision to close the Mohave Generating Station on December 31, 2005. This Motion is filed pursuant to Rule 45 of the Commission's Rules of Practice and Procedure. On this same day, the Coalition has also filed a petition for leave to intervene as a party in A.04-12-014/I.05-05-024 for the purposes of filing this motion and pursuing its approval in this proceeding.

I.

**THE CLOSURE OF THE MOHAVE GENERATING STATION REQUIRES
THE COMMISSION TO IMMEDIATELY CONSIDER AND
GRANT THE COALITION'S MOTION FOR A "JUST TRANSITION."**

SCE's unilateral decision to close the Mohave Generating Station (Mohave) on December 31, 2005, requires the Commission to immediately consider and grant the Coalition's motion for a "Just Transition" for the Hopi Tribe (Hopi) and the Navajo Nation (Navajo) in

¹The Coalition, which has today also filed a petition for leave to intervene in this proceeding, is composed of the following non-governmental organizations: Indigenous Environmental Network, Black Mesa Trust, Black Mesa Water Coalition, To' Nizhoni Ani, Grand Canyon Trust, and the Sierra Club.

response to that closure.² The Coalition's plan to achieve this "just transition" (Just Transition Plan) requires the Commission to grant the relief requested by this motion on an expedited basis.

Specifically, the Coalition moves the Commission, in a separate Mohave Just Transition Phase of I.05-05-024, to direct and authorize SCE to create a new Mohave Sulfur Credit Sub-Account in its Energy Resource Recovery Account (ERRA) tariff and to separately track as a "credit" entry in that sub-account sales of SCE's sulfur allowances created by Mohave's closure, effective December 31, 2005. The Coalition further moves for the Commission to direct SCE to secure funds resulting from the sales "credited" to this new sub-account in an escrow account and to distribute those funds to the Hopi and the Navajo upon receipt by SCE of annual investment plans adopted by a majority of Navajo Chapters in the Black Mesa Region and by a majority of all Hopi Villages that reflect priority conditions for the use of those funds, as described herein. Finally, the Coalition moves that such distributions by SCE be recorded as debit entries to the new Mohave Sulfur Credit Sub-Account and that this sub-account be continued in effect through 2026 when Mohave will otherwise stop operating due to loss of the plant's rights to use Colorado River water for generating electricity.

This request, as described in further detail below, is an appropriate and timely response to SCE's decision to close Mohave and is urgently needed to make restitution to, and provide investment opportunities for, the Hopi and Navajo to mitigate the adverse economic and social impacts of that closure upon these communities. Such restitution is further required to compensate the Hopi and Navajo for subsidizing decades of coal mining and burning that has allowed SCE and its customers to benefit from a supply of cheap power from Mohave. Further,

² On December 30, 2005, multiple news services carried stories in which SCE confirmed closure of Mohave on December 31, 2005. See, e.g., Miguel Bustillo, "Edison to Shut Down Polluting Coal Plant," Los Angeles Times (December 30, 2005) (<http://www.latimes.com/news/local/la-me-mohave30dec30,0,3866549.story?coll=la-home-local>).

the relief requested by this motion will ensure that this “just transition” funding to the Hopi and Navajo will continue until the end of Mohave’s electric generating claims on Colorado River water in 2026.

For these reasons, the Coalition moves for the expedited adoption by the Commission of this requested relief (the Just Transition Plan) that will appropriately permit the Hopi and Navajo people to make a “just transition” from SCE’s closure of Mohave. This expedited treatment, including a request for an immediate Commission decision adopting the Coalition’s proposed tariff change on an interim basis pending final review and approval of this motion, is required to preserve the rights of the Hopi and Navajo on a prospective basis given the closure of Mohave on December 31, 2005.

A. The Just Transition Plan Is Ripe for Consideration and Adoption In a Separate, Expedited Phase of I.05-05-024.

While the Scoping Memo for this general rate case (GRC) application (A.04-12-014) set an expeditious schedule for resolution of Phase I (Southern California Edison Company’s (SCE’s) Test Year (TY) 2006 revenue requirement), the later and separately initiated investigation (I.05-05-024), now consolidated with this application, clearly contemplates consideration of “proposals ... on matters for which the utility may not be the proponent.”³ Further, the investigation is expressly designed “to afford parties, and the Commission, an opportunity and forum to provide and consider evidence on issues” related to the “public interest” and SCE’s “rates, service and *facilities*.”⁴ This investigation remains a viable and current forum for considering “public interest” issues related to SCE “facilities.”⁵

³ I.05-05-024, at p. 1.

⁴ *Id.*, at pp. 1-2; emphasis added.

⁵ The Coalition also notes that neither a Proposed nor a Final Decision on the evidentiary record in Phase I has been issued in this proceeding.

As indicated in the following summary of facts, in Decision (D.) 04-12-016 (closing SCE's Mohave Application (A.) 02-05-046), the Commission had originally intended to defer consideration of unresolved issues relating to the closure of Mohave to R.04-04-003 (the Commission's long term procurement planning proceeding). However, with SCE's unilateral decision *in this proceeding* to reflect expected capital expenditures in their TY 2006 revenue requirement based on a specific resource outcome/scenario of "Mohave In," the issues of the *actual* status of the plant and resulting economic impacts have been brought directly into the scope of I.05-05-024. Further, and of critical importance, despite SCE's reliance on a "Mohave In" scenario in its "update testimony" in this proceeding, SCE has nevertheless proceeded to *close* Mohave effective December 31, 2005, a decision consistent with SCE's actual, stated intentions for the plant.

Therefore, based on the following facts, culminating with Mohave's closure on December 31, 2005, it is the Coalition's position that the Commission must address and resolve issues related to the adverse economic consequences and impacts resulting from that closure on the Hopi and Navajo and grant the relief requested by this motion in a separate, immediate phase of I.05-05-024. As these facts make clear, there is currently no basis to defer resolution of those issues to any other proceeding. Specifically:

1. On December 15, 1999, the federal district court in Nevada entered a Clean Air Act Consent Decree between the owners of Mohave and Sierra Club, Grand Canyon Trust and National Parks Conservation Association. In the decree, the owners agreed to either install modern pollution control equipment on Mohave or close the plant no later than December 31, 2005.
2. In May 2002, SCE filed Application (A.) 02-05-046 to address "the future disposition of the Mohave Generating Station" (Mohave).⁶

⁶ D.04-12-016, at p. 1.

3. On March 1, 2003, SCE decided not to meet its interim deadline to execute a binding contract to design the pollution control equipment necessary to allow Mohave to operate after December 31, 2005. Since that time SCE has not met any of the other conditions or construction deadlines required by the consent decree, confirming its decision to shut down Mohave on or before December 31, 2005.
4. On December 2, 2004, the Commission issued Decision (D.) 04-12-016 in Application (A.) 02-05-046 addressing the future status of the Mohave facility on a limited basis and closing the application. Of significance, D.04-12-016 expressly did *not* resolve significant issues related to acknowledged economic impacts on the Hopi Tribe (Hopi) and the Navajo Nation (Navajo) that would be caused by closing Mohave.
5. Instead, D.04-12-016 authorized SCE to expend funds to meet “critical path investments” to allow Mohave to operate at some time after December 31, 2005, but left the significant issues related to the economic impact of plant closure on the Hopi and Navajo to future studies and proceedings.⁷ Specifically, these important issues were deferred to either R.04-04-003 (long term procurement planning) or “a separate application in R.04-04-003.”⁸ However, SCE has not yet filed, nor has a timetable been established, for consideration of the economic impact issues related to Mohave’s closure in either R.04-04-003 or by separate application and, as noted above, Mohave has now been *closed*.
6. An Assigned Commissioner’s Ruling and Scoping Memo (Scoping Memo) were issued in A.04-12-014 (this SCE general rate case (GRC) application) on March 15, 2005, establishing an ambitious schedule for considering Phase 1 revenue requirement issues that is now expected to result in the issuance of a Commission decision in Phase 1 in January 2006.⁹

⁷ D.04-12-016, at p. 1, 58.

⁸ *Id.*, at p. 58.

⁹ The original schedule for this proceeding called for a Phase I decision to be issued by the Commission at its first meeting in January 2006 (January 12, 2006). However, a Proposed Decision has not yet been issued in Phase I, and instead, a Draft Decision has been placed on the Commission’s January 12 Meeting Agenda authorizing SCE to use a memorandum account to track the change in revenue requirement that will be adopted in this proceeding between January 12 and the actual effective date of a final decision in Phase 1.

7. On May 26, 2005, several months following the issuance of this Scoping Memo, the Commission issued a “companion” and “consolidated” investigation (I.05-05-024) to this application.¹⁰ The Commission specifically identified the purpose of the investigation as follows:

“This investigatory proceeding is opened *to allow the Commission to hear proposals other than SCE’s*, and to enable the Commission to be able to enter orders on matters for which the utility may not be the proponent. It is to afford parties, and this Commission, an opportunity and forum to provide and consider evidence on issues of interest. These issues may result in directives to SCE that serve the *public interest* and result in just and reasonable rates, service, and *facilities*.”¹¹

8. On September 26, 2005, long after notice regarding the scope of Phase I had been identified and D.04-12-016 had been issued closing A.02-05-046 (SCE’s Mohave application), SCE submitted “update testimony” in A.04-12-014 selecting a “Continued Operations” (“Mohave in”) scenario for Mohave as the basis for its related revenue requirement request. Thus, despite the direction in D.04-12-016 regarding the process SCE was to follow for the Commission to consider competing resource scenarios of “Mohave in” versus “Mohave out” (see above) and SCE’s own acknowledgment that “certain critical issues” concerning coal and water supplies “remain unresolved at present,” SCE nevertheless concluded in its “update” testimony: “SCE believes that the most appropriate Mohave scenario to select for purposes of establishing SCE’s revenue requirement is the Continued Operations scenario.”¹²
9. On October 11, 2005, however, SCE witness Harold Ray testified that SCE had *no* plans to operate Mohave after December 31, 2005, and would not incur penalties for continued operation of Mohave in violation of the terms of the applicable Clean Air Act Consent Decree (Consent Decree).¹³

Clearly, SCE’s “update” testimony in Phase 1 was designed by SCE to allow it, from a self-serving, revenue-requirement standpoint, to “cover its bases” regardless of what occurs or

¹⁰ I.05-05-024, at pp. 1-2.

¹¹ I.05-05-024, at pp. 1-2; emphasis added.

¹² *Id.*, at p. 15.

¹³ A.04-12-014, Reporter’s Transcript (RT) at 2999 – 3001 (SCE (Ray)).

has occurred with Mohave operations. However, Mr. Ray's statements under oath confirmed what the Coalition knew then and knows now – SCE intended to shut down Mohave on December 31, 2005, with no other possible alternative since SCE had not invested in the pollution control equipment required by the Consent Decree and did not intend to incur penalties for failure to do so by keeping the plant open beyond the end of 2005.

Further, on December 29, 2005, SCE submitted Advice Letter 1953-E to establish a “Mohave Interim Operation Effort Memorandum Account” (MIOEMA) and to request “Guidance Regarding Certain Potential Mohave Expenditures.” This advice letter confirms that SCE has no immediate plans to install the pollution controls specified by the Consent Decree or to operate Mohave at the risk of being penalized for failure to make those changes. Instead, by AL 1953-E, SCE seeks cost recovery for “expenditures that SCE may make for the purpose of seeking a *modification* of the Consent Decree and other legal provisions ... to enable Mohave to continue or resume operating in the interim *prior* to installation of the pollution controls.”¹⁴

This advice letter, therefore, does not change, but merely confirms what the Coalition knew as of December 31, 2005, and knows today: Mohave has been closed by SCE, SCE has not complied with the Consent Decree's terms for continuing Mohave's operation, and there has been no modification of the Consent Decree to permit SCE to operate the plant without penalty or, alternatively, without compliance with its terms. Given SCE's own recent recognition in AL 1953-E of “the potential serious negative impacts of an extended period of inoperation of Mohave on various stakeholders including the Hopi Tribe and Navajo Nation,”¹⁵ the closure of Mohave and its adverse economic consequences for the Hopi and Navajo people cannot be ignored any longer, but must now be addressed by the Commission in this proceeding. Due

¹⁴ SCE Advice Letter 1953-E, at p. 2; emphasis added.

¹⁵ *Id.*, at p. 2.

process, fairness, and relevance dictate that a separate, well-noticed phase of I.05-05-024 be instituted immediately to ensure that all affected stakeholders have an equal opportunity now, with the closure of Mohave, to address and resolve the economic impacts of the operational status of Mohave in the near and long term.

It is to this end that the Coalition has filed this motion and requested relief, as described further below, appropriately targeted to address and resolve the critical issue of the economic impact of Mohave's closure on the Hopi and Navajo people. On this point, the Commission has already concluded in D.04-12-016 that "studies" and alternatives addressing Mohave closure, replacement, or continued operation must take into account "Mohave's economic benefits for the Hopi and Navajo communities."¹⁶ It is the Coalition's position that initiating a separate phase of I.05-05-024 now to consider the Coalition's motion and Just Transition Plan directly responds to these directives and, given confirmation of SCE's closure of Mohave on December 31, 2005, is ripe for consideration in this consolidated proceeding.

B. The Just Transition Plan Requests and Provides for Appropriate Economic Restitution of the Navajo and Hopi Through Commission Authorization of a Change in SCE's ERRA Tariff Directly Tied to Mohave's Closure.

In A.02-05-046, SCE's now closed application to consider the status of Mohave, Nicole Horseherder, on behalf of the To' Nishoni Ani, Water and Energy Consulting (WEC), Hopi, and Diné, testified as follows:

"Our coal generates the electricity for millions of people in California, Nevada and Arizona. The Navajo Nation does not receive ... a single kilowatt of electricity from Mohave Generating Station. Further, the Navajos (Diné) people on Black Mesa do not receive even 1% of the royalties that is paid to the Navajo Nation from coal and water sales. For more than 30 years we have been the source of cheap coal, water, and electricity. We have kept costs down and profits high for both Peabody Coal Company and the owners of Mohave Generating Station."¹⁷

¹⁶ D.04-12-016, at p. 2.

¹⁷ Quote of Nicole Horseherder of To' Nizhoni Ani, WEC, Hopi, and Dine' Testimony in A.02-05-046, 3/26/2003, page 24.

With the closure of Mohave, these sacrifices made by the Hopi and Navajo for the benefit of SCE and its customers can no longer be ignored and must be redressed now. In response, the Coalition proposes the Just Transition Plan as a direct and simple basis for providing economic restitution for the Navajo and Hopi in response to *SCE's* decision to close Mohave. While, as noted below, the Coalition recognizes that there are other minority owners of Mohave, it has been SCE's decisions as majority owner that have driven operations of the plant. In response, the Coalition's Just Transition Plan proposes an appropriate and relevant change to SCE's Energy Resource Recovery Account (ERRA) tariff to ensure that SCE does not receive any windfall profit for SCE's own failure to make the long-expected pollution control investments in Mohave required to continue its operations without penalty under the terms of the Consent Decree. This tariff change will enable a process:

- To mitigate the economic impact caused by the closure of Mohave Generating Station and the reduction of coal production from Black Mesa Mine after December 31, 2005;
- To provide funding to Navajo and Hopi communities so that they can become equity owners in generating and transmitting new sources of cleaner energy; and
- To assist in reducing unemployment and stimulating a just transition to sustainable economic development on tribal lands.

Such restitution is a completely appropriate response to the Navajo and Hopi having subsidized several decades of coal mining and burning for the benefit of SCE, which, among other things, has yet to incur costs for installing pollution controls long required by the Consent Decree. These subsidies, which have acted to reduce the real cost of power supplied from Mohave, also include undervalued coal royalties; inadequate payments for groundwater pumping; unpaid penalties for regional air pollution in violation of the Clean Air Act, for damage

to the health of residents in the region, and for impaired visibility at the Grand Canyon and other protected national parks in the region. The Just Transition Plan will provide the Hopi and Navajo with needed economic security about their future, will permit them to develop cleaner energy alternatives that will have local environmental benefits, and will create the opportunity for new, cleaner energy resources to be developed to meet electric demand in California.

The Coalition, therefore, moves for the Commission to require SCE to modify its ERRA in a manner that will have limited impact, if any, on SCE's ratepayers, but will provide funds to the Hopi and Navajo that would otherwise have been a windfall to SCE. Specifically, once Mohave closes, the Coalition calculates that the owners of Mohave, including SCE, will receive funds from the sale of approximately 53,000 tons of sulfur allowances upon facility shut-down. Currently, with SCE's closure of Mohave on December 31, 2005, such a sale would yield at least \$65 million annually at current prices of approximately \$1,300 per ton on the spot market. Based on its ownership share, SCE would receive 56% of this amount. While the Coalition recognizes that three other utilities own a percentage of the sulfur allowances, it was SCE's unilateral decision to shut down Mohave on December 31, 2005, instead of making the necessary pollution control investments in Mohave required by the Consent Decree. This decision by SCE has now made it necessary to seek economic relief and restitution for the Hopi and Navajo in this relevant and timely Commission venue. The Coalition also notes that it has committed to working with Mohave's minority owners and their respective regulatory authorities to ensure that each contributes their share of the value of sulfur allowances as part of the Just Transition Plan.

With respect to SCE, Commission decisions and the general language of the ERRA Preliminary Statement make clear that SCE's ERRA account has been established to record and

account for SCE's fuel-related costs.¹⁸ With respect to Mohave specifically, SCE's recently filed advice letter seeking authority to create the MIOEMA confirms that all "fuel-related costs" associated with Mohave will continue to be tracked in SCE's ERRA and will "not be tracked within the MIOEMA."¹⁹

To achieve a "just transition" as a result of SCE's decision to close Mohave, the Coalition's Just Transition Plan and this motion asks the Commission to direct and authorize SCE to modify its ERRA to provide that proceeds from the sale of SCE's sulfur allowances upon closure of Mohave will be included in the ERRA as a "credit" entry to a new and separate Mohave sulfur credit sub-account ("Mohave Sulfur Credit Sub-Account) of the ERRA. The creation of this separate sub-account makes clear that the amounts collected from these sales are not shareholder dollars and will permit such funds to eventually be distributed to the Navajo and Hopi people through an additional accounting change that would record such distributions as debit entries to the sub-account.²⁰ The Coalition further asks that the Commission direct SCE to secure these funds in an escrow account and distribute them to the Hopi and Navajo upon their adoption of annual investment plans as described further below.

This mechanism is an ideal solution for both interim and long term economic restitution to the Navajo and Hopi and is adaptable to either short or long term plant closure. For this reason and given Mohave's closure effective December 31, 2005, the Coalition's motion also requests that the Commission immediately adopt its proposal for accounting for sulfur emissions credits as a separate sub-account of ERRA on an interim basis at the Commission's Agenda

¹⁸ See, e.g., D.02-10-072, D.02-10-074, and SCE's ERRA Preliminary Statement (ZZ).

¹⁹ *Id.*, at p. 3.

²⁰ The Commission should act immediately to establish this separate ERRA sub-account on an interim basis while the remainder of the Just Transition Plan is under consideration to ensure that shareholders do not gain benefits of the emissions allowances that are sold or are currently being sold with Mohave's closure on December 31, 2005. With that closure, such action would also preserve the rights of the Hopi and Navajo with respect to those credits on a forward going basis. .

Meeting of February 16, 2006, in order to prevent shareholders from asserting claims to any revenues from sulfur allowance sales while the overall Just Transition Plan is under consideration and to preserve the rights of the Navajo and Hopi to such credits realized during the same period. Under no circumstances, should these revenues flow to shareholders nor be lost to the Hopi and Navajo while final Commission action on this motion is pending.

C. The Just Transition Plan Requests and Provides an Opportunity for the Navajo and Hopi People to Invest in Renewable and Cleaner Energy Options.

The purpose of Just Transition Plan is to allocate funds derived from the closure of Mohave Generating Station to enable Navajo and Hopi communities to invest in sustainable economic alternatives, including renewable energy options. The Plan offers opportunities for the nations, ratepayers, and the environment to benefit by shifting from an older, dirty source of electricity to cleaner energy alternatives. In response to the current opportunities presented by the closure of Mohave, Roger Clark of the Grand Canyon Trust recently observed:

“‘The best scenario would be for Edison to give up trying to keep Mohave open and, instead, invest in alternative energy projects and transmission lines that would help the Hopi and Navajo exploit their potentially abundant wind and solar power resources.... With California wanting to invest in cleaner forms of energy...why buy another 20 years of inefficient, old coal-fired generation?’”²¹

On December 2, 2004, the Commission ordered SCE in D.04-12-016 to “explore alternatives to Mohave continuing operation as a coal-fired plant” and to perform a “study [focused] on exploring the specifics of these possible options so they may be compared with Edison’s Mohave share ... or considered as alternatives to replace the power from Mohave in the scenario where the plant is permanently closed or compliment the generation from Mohave if Mohave returns to service.”²² In addition, the alternatives investigated are “to include options

²¹ Lifsher, Marc “Deal May be Near on Power Plant” *Los Angeles Times*, 11-08-05. From interview with Grand Canyon Trust Air & Energy Program Director Roger Clark.

²² D.04-12-016, at p. 70.

that provide economic stability to the Hopi Tribe and Navajo Nation, and where appropriate, utilize renewable resources for generation.”²³

Significantly, however, in D.04-12-016, the Commission did not provide funding for developing the means to finance or implement any of the alternatives that the study identifies and evaluates. As a result, the expected cost of nearly \$2 million for the study is unlikely to result in any actual development of alternatives to mitigate the economic impacts of Mohave’s closure to Navajo and Hopi people.

The Coalition, therefore, believes that funds generated from the sales of SCE’s sulfur allowances upon closure of Mohave and recorded in the new and separate “Mohave Sulfur Credit Sub-Account” of the ERRA, described above, be allocated for the general purposes of sustainable and culturally appropriate economic development by Navajo and Hopi communities. To this end, the Coalition further moves the Commission to direct SCE to secure these funds into an escrow account and distribute those funds upon receipt of annual investment plans approved and adopted by a majority of Navajo Chapters in the Black Mesa Region and by a majority of all Hopi Villages.²⁴ The Coalition further recommends that those plans reflect the following priority use of these funds as follows:

- Priority should be given to develop projects that will employ all displaced workers from the shutdown of Black Mesa Mine, until or unless the mine is re-opened;
- Priority should be given to help mitigate contamination and other environmental issues inside and outside the areas of operation that have arisen from the many years of mining and supply operations;

²³ Id.

²⁴ The division of the amount to be divided between Navajo and Hopi interests should be commensurate with the division of coal royalties from Black Mesa Mine to the two tribes. The designation of specific Navajo chapters to approve and to be eligible for access to Just Transition Plan funding should include Western Navajo chapters until further amendments to these recommendations by the Coalition.

- Priority should be given to develop clean, renewable energy sources, in combination with other investment opportunities, to benefit the future of Navajo and Hopi communities.

The Just Transition Plan, with its proposed tariff change, is an ideal solution for both interim and long term economic restitution to the Navajo and Hopi, is adaptable to either short or long term plant closure, and allows just transition funding to Hopi Tribe and Navajo communities until at least 2026 when Mohave would otherwise stop operating due to loss of its rights to use Colorado River water for generating electricity. After 2026, the sulfur credits should be retired by SCE to ensure a long-term environmental benefit. The Coalition further strongly recommends that the sulfur allowances only be sold in areas that would pose the least overall impact on the health and safety of communities that are already bearing a disproportionate impact.

The Commission should act quickly to authorize the Coalition's proposed change in SCE's ERRRA account immediately through an interim, ex parte decision issued no later than the Commission's meeting of February 16, 2005, to ensure that, with the closure of Mohave on December 31, 2005, none of the subsequent sales of a sulfur allowances will be credited to shareholders and none will be lost to the Navajo and Hopi, subject to the Commission's final decision on this motion. The Coalition, therefore, asks for the Commission's immediate consideration of this proposal by granting the Coalition's motion, inclusive of its request for an interim order and its proposed overall schedule for review of the motion, described below.

D. The Just Transition Plan Offers an Unprecedented Opportunity for the Commission To Provide Appropriate Economic Justice and Restitution to the Navajo and Hopi People.

The economic restitution of the Hopi and the Navajo that requires the Commission action requested by this motion has its origins in a long history of sacrifices made by the Hopi and

Navajo to provide cheap power from Mohave to SCE and its customers. As one author has observed:

“The methods of conquering the tribes were many and diverse: war, land sales, bad resource deals, cultural assimilation, and the treachery of their friends. As for the land, the most notable conquest took place from about 1955 through 1975. I have come to call it the Big Buildup. The cities surrounding the Plateau—Denver, Albuquerque, El Paso, Phoenix, Tucson, Las Vegas, Salt Lake City, San Diego, Los Angeles—had exhausted their own local resources. Civic leaders organized a concerted campaign for the rapid, wholesale development of the energy and water of the Colorado Plateau....The consequences of this conquest—for the land, rivers, air, and human health—were many, and they are with us still. So, too, are the consequences for the tribes. Among other things, the linchpin for the Big Buildup was Black Mesa, sacred ground for the Hopi and Navajo, who leased their coal and water at prices far below market value.”²⁵

After 35 years of running Mohave at great cost to the Navajo and Hopi, it is now unreasonable to permit SCE to reap hundreds of millions of dollars in new, unearned revenues from the sale of sulfur allowances as the result of SCE’s own decisions to close Mohave and not to invest in long-required and needed pollution controls or to incur fines for its failure to do so. Specifically, SCE has not invested one cent in pollution controls or paid a penny in fines potentially amounting to billions of dollars for nearly continuous violations of the Clean Air Act. The Just Transition Plan proposes to redistribute the value of the sulfur allowances to the Navajo and Hopi people in partial restitution for economic losses that they have incurred while SCE and its customers have benefited from inexpensive electricity generated by Mohave. That benefit, in the form of cheap energy supplied from Mohave, has come at the high price of the Hopi and Navajo suffering from long-delayed action by SCE in investing in needed pollution controls, exacerbated by years of unjust coal leases, unfair water use, and unpaid penalties for air pollution.

²⁵ Charles Wilkinson, *Fire on the Plateau*, 1999, p. xii.

1. SCE's Decision to Close Mohave Seeks to Avoid Long-Delayed Investment in Air Pollution Controls and Unpaid Air Pollution Penalties to the Detriment of the Hopi and Navajo People.

The Mohave Generating Station has been operating without significant pollution controls since it opened in 1971. Local protests and legal actions over emissions began soon thereafter. However, operations continued unchanged until the end of the 1990s when the Grand Canyon Trust, Sierra Club, and National Parks and Conservation Association sued the plant's owners for violating air quality and health standards under the federal Clean Air Act. The conservation groups demonstrated that the plant violated its pollution limits over 400,000 times between 1993 and 1998. These violations, the lawsuit argued, threatened the health of people who lived near the plant.

Because the maximum fine for each violation is \$27,500, the maximum potential liability was more than \$10 billion for the period of five years. After intensive negotiations, the Mohave owners, including SCE, as majority owner, and conservation groups signed a Consent Decree in 1999, which provided six years for the plant to install pollution controls or shutdown. This six-year period was sufficient time for the owners not only to install the controls, but also to negotiate new coal and water contracts with the Navajo and Hopi tribes and with Peabody Coal Company. Instead of taking that course of action, SCE chose to close Mohave on December 31, 2005.

The 2003 average annual emissions for the power plant included 39,099 tons of sulfur dioxide, 19,201 tons of nitrogen oxides, 1,924 tons of particulate matter, and 9.9 million tons of carbon dioxide.²⁶ Its nitrogen emissions amount to about the emissions equivalent to 1.5 million automobiles. Sulfates, caused by sulfur dioxide emissions from it and other power plants, are the

²⁶ Energy Information Administration Form 767 and Environmental Protection Agency's (EPA's) Clean Air Markets Division

single largest contributor to the haze and reduced visibility that visitors experience at the Grand Canyon and 27 other national parks, national monuments, and wilderness areas in the Four Corners region downwind from Mohave Generating Station.²⁷ During the last six years since the Consent Decree was signed, the power plant has continued operations in violation of the law and spewed 240,000 tons of sulfur dioxide, 120,000 tons of nitrogen oxide and 12,000 tons of particulate matter into the region's air, putting the respiratory health of area residents at risk and obscuring visibility at Grand Canyon National Park.

During the last 35 years, SCE, as the majority owner of Mohave, and its customers have benefited from receiving power from Mohave that has been among the least expensive in the nation²⁸ and have, at the same time, sought to avoid and have successfully escaped their entire financial liability for paying billions of dollars in fines for illegally polluting the air, while people who live downwind from the plant have suffered without compensation. The Just Transition Plan will provide some restitution for this unfair allocation of the benefits and detriments caused by Mohave and its operations and will prevent the further exploitation of the Hopi and Navajo people through an appropriate distribution of funds from the sale of sulfur credits arising from the plant's closure. Achieving that goal requires the Commission to direct and authorize SCE to make the tariff changes and take the other actions requested by this motion on an expedited basis.

²⁷ From studies by the Grand Canyon Visibility Transport Commission and Project MOHAVE, *Final Report*, March 19, 1999.

²⁸ Electricity produced at Mohave sells for approximately \$.02 per kilowatt hour, at least half the cost of power purchased from other sources.

2. Other Related Histories of Unjust Compensation of the Hopi and Navajo for Coal And Water Resources Needed to Operate Mohave Further Underscore the Need for Restitution Upon SCE's Decision to Close the Plant.

Coal leases, used to provide coal from the Black Mesa mine to the Mohave Generating Station, were approved in 1966 by the U.S. Department of Interior. Signed by the Hopi tribal council, the coal lease agreements provided for 35 years of mining, wherein "... Peabody Coal agreed to pay thirty-seven and a half cents per ton of coal."²⁹ Price comparisons show that the value of the coal extracted in 1980 was \$5.9 million, while the royalties paid to the tribe amounted to \$311,300 during the same time period.

The original coal leases were negotiated by attorney John Boyden who represented the Hopi tribe while he was covertly working for Peabody Coal Company.³⁰ He negotiated leases that allowed the Hopis to receive only 3.3% of total gross sales, about half the rate that the federal government was getting in mining royalties at the time.³¹

In addition, the Navajo and Hopi tribes waived their rights to levy severance and possessory taxes in the lease. Because both tribes waived their ability to tax Peabody on the coal sold from Navajo and Hopi lands, significant funds were unjustly denied both tribes for decades of compensation. The estimated revenue collected by the Hopi Tribe would have totaled \$2.6 million in possessory taxes, \$7.3 million in excise taxes, and \$13.1 million in severance taxes. These amounts reflect tax revenue estimates from 1989 to 2011 and total over \$23 million over an estimated 22-year time frame, and therefore would have increased Hopi tribal income by more than one million dollars per year.³²

²⁹ Ellen G. Callister, *The Journey of the DINE*, 2004, p. 30.

³⁰ Wilkinson, *Ibid*, pp.118-121.

³¹ <http://www.phoenixnewtimes.com/issues/1997-05-01/news/feature.html>. Dougherty, John, "A People Betrayed: Documents indicate that the lawyer who represented the Hopi Tribe in crucial negotiations with Peabody Western Coal Company was working for the mining company at the same time." Phoenix New Times, 1997.

³² Vernon Masayesva, 2005: Personal Interview.

Although new lease agreements were renegotiated in 1987, the Navajo Nation filed suit against the U.S. Department of Interior for breach of trust and for failure to adequately represent tribal interests during the negotiations. The lawsuit alleged that Peabody hired a lobbyist who was a personal friend of then-Interior Secretary Donald Hodel to fight the tribe's request for a 20 percent royalty rate on the coal.³³ Peabody lost an appeal to an administrative law judge of the Department of Interior for the 20% increase in the royalty rate. According to government memos, one of which was prepared by Peabody, Hodel suppressed a Bureau of Indian Affairs decision favoring the higher rate and told the tribe to continue negotiations. The tribe, facing economic pressure, accepted a 12.5 percent royalty rate at the time, but later argued that the decision cost them lost royalties in the amount of \$600 million.

However, in a separate legal proceeding, the Navajo Nation filed a complaint in June 1999 against Peabody Holding Company, Southern California Edison, and Salt River Project asserting claims for, among other things, "...violations of the federal Racketeer Influenced and Corrupt organizations statute, interference with fiduciary duties and contractual relations, fraudulent misrepresentation by nondisclosure, and various contract related claims."³⁴ The complaint claims that the defendants' actions prevented the Navajo Nation from obtaining the full value in royalty rates for coal supplied to Mohave. The complaint seeks damages of not less than \$600 million, trebling of that amount, and punitive damages of not less than \$1 billion, as well as a declaration that Peabody's lease and contract rights to mine coal on Navajo Lands should be terminated.³⁵ Various aspects of the claims are pending, but remain entangled in proceedings ordered by the D.C. District Court, Circuit Court, and the Court of Federal Claims.

³³ US Court of Appeals for the Ninth Circuit No.03-15272, "Peabody Coal Company v. Navajo Nation," 2004, at p. 7996..

³⁴ Southern California Edison, Quarterly Report to the U.S. Securities and Exchange Commission, June 30, 2005, p.19.

³⁵ Id.

Regardless of the outcome of these legal actions, there is ample evidence that leases supplying coal to Mohave Generating station have not fairly compensated the Navajo and Hopi people and have burdened them with enormous and unnecessary legal expenses.

Further, coal from Black Mesa mine is mixed with 4,000 acre feet of water per year and pumped as a slurry mixture through a 273-mile pipeline between the mine at Black Mesa and Mohave Generating Station in Laughlin, Nevada. The Hopis were originally paid \$1.67 and the Navajos \$5.00 per acre foot of groundwater pumped from the Navajo aquifer (N-aquifer) located beneath Black Mesa.³⁶ Although the prices paid to the tribes were renegotiated in 1987, both tribes are now opposed to the use of N-aquifer water to slurry coal to the Mohave Generating Station.³⁷

The Just Transition Plan and the relief requested by this motion offer an opportunity to create a fund that will provide partial restitution for this long history of economic exploitation of the Hopi and Navajo through unjust coal leases, of which SCE and its customers have clearly been beneficiaries. The Plan is also clearly needed to avoid further windfall gains created by the sale of sulfur credits upon Mohave's closure flowing inappropriately to SCE shareholders.

II.

PROPOSED SCHEDULE FOR CONSIDERATION OF THIS MOTION IN MOHAVE JUST TRANSITION PHASE OF I.05-05-024

As noted above, the Coalition believes that its Just Transition Plan is well within the scope of I.05-05-024. For this reason, the Coalition requests that a separate "Mohave Just

³⁶ http://supreme.lp.findlaw.com/supreme_court/briefs/01-1375/01-1375.mer.usa.ja2.pdf Current prices paid for pure groundwater often exceed \$500 per acre foot.

³⁷ <http://www.phoenixnewtimes.com/issues/2005-12-01/news/dougherty.html> Dougherty, John "Wisdom of the Ancestors" *Phoenix New Times* 2005-12-05. In an interview with former Hopi Tribal Chairman Vernon Masayesva, the article states: "Peabody essentially stole the Hopis' water. And the company did so with the approval of the U.S. Bureau of Indian Affairs. This theft of the tribe's water, Masayesva said, was just the beginning of a massive rip-off of the Hopis' natural resources."

Transition Phase” be instituted in this consolidated proceeding to provide the expedited review of the relief requested by this motion according to the following schedule:

PROPOSED MOHAVE JUST TRANSITION PHASE SCHEDULE

DATE	EVENT
January 26, 2006	Responses to Just Transition Plan Motion.
February 1, 2006	ALJ’s Ruling Setting Prehearing Conference for February 10, 2006 on Schedule for Review of Just Transition Plan Motion.
February 6, 2006	Reply by Coalition (with ALJ permission) to Responses.
February 10, 2006	Prehearing Conference on Just Transition Plan Motion.
February 16, 2006	Emergency Interim Order Issued by Commission Approving ERRRA Tariff Change on an Interim Basis Pending Final Review and Approval.
March 1, 2006	Comments on Just Transition Plan Motion or Concurrent Testimony (if evidentiary hearings are required).
March 15, 2006	Evidentiary Hearings (if required).
April 10, 2006	<i>Either</i> Draft Decision on Just Transition Plan Motion (if evidentiary hearings are not required) <i>or</i> Concurrent Briefs on Just Transition Plan (if evidentiary hearings are required).
May 11, 2006	<i>Either</i> Commission Final Decision on Just Transition Plan Motion (if evidentiary hearings are not required) <i>or</i> Draft Decision on Just Transition Plan Motion (if evidentiary hearings are required).
June 15, 2006	Commission Final Decision on Just Transition Plan Motion (if evidentiary hearings are required).

REQUESTED RELIEF

SCE's unilateral decision to close Mohave Generating Station on December 31, 2005, requires the Commission to immediately consider and grant the Coalition's motion for a "Just Transition" to address and resolve the economic consequences and impact of that closure on Hopi and Navajo people. After 35 years of running Mohave at great cost to the Navajo and Hopi, it is now unreasonable to permit SCE to reap hundreds of millions of dollars in new, unearned revenues from the sale of sulfur allowances as the result of SCE's decision to close Mohave. SCE has not invested one cent in pollution controls or paid a penny in fines potentially amounting to billions of dollars for nearly continuous violations of the Clean Air Act. The Just Transition Plan Motion requests a change in SCE's Energy Resource Recovery Account (ERRA) directly tied to plant closure that will serve to redistribute the value of the sulfur allowances to the Navajo and Hopi people in partial restitution for economic losses that they have incurred while SCE and its customers have benefited from inexpensive electricity generated by Mohave.

Therefore, the Coalition respectfully moves the Commission to grant the following relief on an expedited basis, with interim approval no later than February 16, 2006:

(1) To address and resolve the Coalition's motion immediately in a separate Mohave Just Transition Phase of I.05-05-024 pursuant to the schedule for that phase proposed in this motion.

(2) To authorize SCE to modify its Energy Resource Recovery Account (ERRA) tariff to create a new and separate Mohave Sulfur Credit Sub-Account, as described above, and direct SCE to separately track as a "credit entry" in that sub-account sales of SCE's sulfur allowances created by Mohave's closure, effective December 31, 2005.

(3) To direct SCE to secure funds resulting from the sales "credited" to this new sub-account in an escrow account and to distribute those funds to the Hopi and the Navajo upon

receipt by SCE of annual investment plans adopted by a majority of Navajo Chapters in the Black Mesa Region and by a majority of all Hopi Villages that reflect priority conditions for the use of those funds, as described herein.

(4) To direct SCE to record such distributions as debit entries to the Mohave Sulfur Credit Sub-Account.

(5) To permit the Mohave Sulfur Credit Sub-Account to continue in effect until at least 2026 when Mohave will otherwise stop operating due to the loss of the plant's rights to use Colorado River water for generating electricity.

Respectfully submitted,

JUST TRANSITION COALITION

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January 11, 2006

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CERTIFICATE OF SERVICE

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28th Avenue, San Francisco, California 94121.

On January 11, 2006, I served the within document **MOTION FOR A “JUST TRANSITION” IN RESPONSE TO CLOSURE OF THE MOHAVE GENERATING STATION**, in A.04-12-014/I.05-05-024, with electronic service as prescribed in this proceeding, at San Francisco, California.

Executed on January 11, 2006, at San Francisco, California.

/s/ SARA STECK MYERS

Sara Steck Myers